

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

ROBERT W. JACKSON,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 06-300-SLR
)	
CARL DANBERG, et al.,)	
)	
Defendants.)	

DEFENDANTS' RESPONSE TO
PLAINTIFFS' MOTION TO AMEND THE DISCOVERY SCHEDULE AND FOR A
NEW TRIAL DATE

On May 8, 2006, Plaintiff filed his Complaint (D.I. 2), motion for preliminary injunction and opening brief in support thereof (D.I. 5, 6), motion for discovery (D.I. 4), and motion to proceed *in forma pauperis* (D.I. 1). On May 9, 2006, this Court granted Plaintiff's motion for preliminary injunction. (D.I. 9). On September 8, 2006, Defendants filed their answer to the complaint. (D.I. 14). On October 3, 2006, Defendants filed a response to Plaintiff's motion for discovery. (D.I. 18). On October 6, 2006, this Court entered a scheduling order (D.I. 20), with the following deadlines: joinder of parties and amendment of pleadings—December 1, 2006; discovery—June 30, 2007; motions *in limine*—June 6, 2007. On October 25, 2006, this Court amended the scheduling order to set trial for September 4, 2007. (D.I. 23).

On November 29, 2006, Plaintiff's counsel were provided a tour of the building at the Delaware Correctional Center ("DCC") used to carry out executions by lethal injection. On February 20, 2007, Plaintiff's counsel provided Defendants' counsel with

an interrogatory request, as well as requested depositions of the Warden and two Deputy Wardens of DCC. On March 22, 2007, Defendants responded to this discovery, both interrogatories and document production. (D.I. 34, 35). Plaintiff deposed Warden Thomas Carroll on March 27, 2007. Plaintiff deposed Deputy Warden Elizabeth Burris and Deputy Warden David Pierce on March 28, 2007. On March 30, 2007, Plaintiff's counsel advised Defendants' counsel of their intent to depose ten additional persons, and requested that these depositions all take place the week of May 21, 2007. Also on March 30, 2007, Plaintiff's counsel submitted to Defendants' counsel an additional discovery request and proposed conducting the expert depositions during the last two weeks of June. On May 7, 2007, Defendants responded to Plaintiff's most recent discovery request, again both interrogatories and document production (D.I. 35). As Plaintiff has acknowledged, Defendants have thus far produced approximately 2,500 pages in document production.

On May 21, 2007, Plaintiff deposed "John Doe II," a member of the injection team. On May 23, 2007, Plaintiff deposed the "physician" involved in pronouncing the death of the condemned. On May 24, 2007, Plaintiff deposed both former Commissioner Stanley Taylor and present Commissioner Carl Danberg. On May 25, 2007, Plaintiff deposed "John Doe III," a member of the injection team. Two persons previously made available for deposition that week have been rescheduled to June 4 and June 5, 2007.

At this time, Defense counsel has not succeeded in making contact with two previous injection team members (identified as "John Doe I" and "Jane Doe II"). Former Warden Robert Snyder did make himself available for a deposition on April 23 and 24, 2007, but Plaintiff's counsel were unavailable on this date, of which they had less than a

week's notice. Since that time, former Warden Snyder has been unavailable, out of state, and his deposition has not been rescheduled.

Defendants did make their expert available for deposition, and provided Plaintiff's counsel with the following dates within the requested time period: June 18 or 20. Plaintiff's counsel declined to schedule expert depositions before all fact witnesses had been deposed and did not indicate an acceptable time to reschedule. Therefore, Defendants have not attempted to reschedule the deposition of Dr. Dershwitz.

Plaintiff has now proposed three new experts to opine on issues readily apparent to Plaintiff early in the litigation, and points to these as yet unidentified experts as a reason to prolong the discovery process. Although Defendants agreed to extend expert discovery deadlines for Dr. Heath and Dr. Dershwitz, Defendants were unaware that Plaintiff would add new experts to the process at this late date. Notably, Plaintiff was aware of the drugs administered in Delaware executions before the commencement of this litigation. *See* D.I. 2.

Plaintiff waited nearly five months after the Court had put in place a scheduling order to take the first deposition in this case. Defendants have complied with Plaintiff's discovery requests in a timely manner. The Court's scheduling order gave the parties approximately eight months to conduct discovery. Eight months is not an artificially short period of time to complete discovery. Furthermore, Defendants are willing to give Plaintiff additional time to complete discovery, so long as Plaintiff makes those efforts without resulting in the postponement of the September 4, 2007 trial date. *See, e.g., Hamilton v. Jones*, 472 F.3d 814, 816 (10th Cir. 2007). The State of Delaware has a valid interest in carrying out lawful sentences, including sentences of death, without undue

interference from the federal courts. *See Hill v. McDonough*, __U.S. __, 126 S.Ct. 2096, 2104 (2006). Plaintiff has accurately predicted that Defendants do not agree with Plaintiff's characterization of the evidence in paragraph sixteen of the motion to amend scheduling order. That said, a motion to amend a scheduling order is not an appropriate venue to engage in characterization of the evidence thus far produced in discovery. Defendants fear that, particularly with the existing vacancy in the District Court, Your Honor would not likely have available a new trial date this calendar year.

WHEREFORE, Defendants request that the Court amend the scheduling order to permit additional time for the parties to complete discovery, but keep in place the September 4, 2007 trial date.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ _____
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Dated: June 1, 2007

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AMENDED SCHEDULING ORDER

Expert reports due by July 15, 2007.

All fact discovery shall be commenced in time to be completed by July 31, 2007.

Deposition of expert witnesses to be completed by August 17, 2007.

Pre-trial conference to be held on August ____, 2007 at ____ a.m./p.m.

IT IS SO ORDERED, this ____ day of June, 2007.

Sue L. Robinson
Chief Judge

CERTIFICATION OF SERVICE

The undersigned certifies that on June 1, 2007, he electronically filed the attached *Response to Motion to Amend Scheduling Order and for New Trial Date* with the Clerk of Court using CM/ECF which will send notification of such filing to the following registered participant:

Michael Wiseman, Esq.
Assistant Federal Defender
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Attorney for Robert Jackson

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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